

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER SESSION 1995

FILED
February 22, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE)
)
 Appellee,)
)
 VS.)
)
 TOMMY SMITH,)
)
 Appellant.)

C.C.A. NO. 03C01-9503-CR-00074

ROANE COUNTY

HON. E. EUGENE EBLEN
JUDGE

(Sentencing)

ON APPEAL FROM THE JUDGMENT OF THE
CRIMINAL COURT OF ROANE COUNTY

FOR THE APPELLANT:

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FOR THE APPELLEE:

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ORDER FILED _____

AFFIRMED
PURSUANT TO RULE 20,
RULES OF THE COURT OF CRIMINAL APPEALS

JERRY L. SMITH, JUDGE

ORDER

_____ In this direct appeal, the Appellant was convicted on pleas of guilty to charges of possession with the intent to sell a schedule II controlled substance and possession with the intent to sell a schedule IV controlled substance. He applied for so-called judicial diversion pursuant to Tenn. Code Ann. § 40-35-313(a)(1).^{*} The trial judge denied the application and sentenced the Appellant to concurrent terms of three years on the schedule II conviction and two years on the schedule IV conviction. The sentences were suspended and the Appellant was placed on ordinary probation. He now appeals the denial of his application for judicial diversion.

The decision of whether to place a criminal defendant on judicial diversion is within the sound discretion of the trial court and that decision will not be reversed on appeal if there is any substantial record evidence to support it. Tenn. Code Ann. § 40-35-313(a)(1) (Supp. 1995); State v. Bonestel, 871 S.W.2d 163, 168 (Tenn. Crim. App. 1993). Even if a defendant meets the eligibility prerequisites for consideration under Tenn. Code Ann. § 40-35-313, he or she is not entitled to judicial diversion as a matter of right. Although not resulting in convictions, a defendant's prior criminal behavior is a sufficient basis to deny judicial diversion. See State v. Beverly, 894 S.W.2d 292 (Tenn. Crim. App. 1994).

This record reflects the Appellant meets the minimum eligibility requirements for consideration under § 40-35-313. However, his admitted extensive drug use in the past is alone a sufficient basis for denying judicial diversion. See Beverly, 894 S.W.2d. Consequently, it does not appear the trial judge abused his discretion in

^{*}Tenn. Code Ann. § 40-35-313 permits a trial court upon a finding of guilt either by plea or trial to place a defendant on probation without imposition of a judgment of conviction. Following successful completion of a term of probation which could last as long as the maximum sentence for the crime, the charge is dismissed.

denying judicial diversion. The judgment of the trial court is affirmed pursuant to Rule 20 of the Court of Criminal Appeals of Tennessee.

JERRY L. SMITH
JUDGE

CONCUR:

DAVID G. HAYES, JUDGE

WILLIAM M. BARKER, JUDGE